No. 12,493

IN THE

United States Court of Appeals

For the Ninth Circuit

J. GORDON TURNBULL, SVERNDRUP AND PARCEL and UNITED STATES FIDELITY AND GUARANTY COMPANY,

Appellants,

vs.

ALBERT J. CYR, Deputy Commissioner for the Thirteenth Compensation District of the Bureau of Employees' Compensation, FEDERAL SECURITY AGENCY and LOIS G. M. ROSS, alleged widow of Kenneth R. Ross, and JOHN GARY ROSS (a minor child),

Appellees.

Appeal from the United States District Court, Northern District of California, Southern Division.

BRIEF FOR APPELLEE DEPUTY COMMISSIONER CYR.

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Dated, June 6, 1950.

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STATEMENT OF CASE.

This is an appeal from an order of the United States District Court for the Northern District of California, Southern Division, Honorable Dal M. Lemmon, District Judge, confirming a compensation

order of the deputy commissioner filed on July 8, 1948, in which he awarded compensation to Lois G. M. Ross and John Gary Ross, widow and minor son, respectively, of Kenneth R. Ross, hereinafter called "deceased" on account of the latter's death on March 13, 1948 from tuberculosis resulting from his employment. The said compensation order was issued pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424; 33 U.S.C.A. sec. 901 *et seq.* as made applicable to employments at certain defense base areas and under certain public works contracts by the Act of August 16, 1941, as amended, 55 Stat. 622; 42 U.S.C.A. secs. 1651 to 1654. The compensation liability of the employer was insured by the United States Fidelity & Guaranty Company, one of the appellants.

The deputy commissioner held a hearing on June 15, 1948 (Transcript 29) and upon the evidence adduced at said hearing found that Lois G. M. Ross and John Gary Ross were the widow and minor child, respectively, of the deceased and entitled to compensation as such.

FACTS.

In the compensation order the deputy commissioner found the facts to be as follows:

> "Compensation Order having been filed herein on April 26th, 1946 awarding to Kenneth R. Ross compensation benefits for temporary total disability at the weekly rate of $25.00 and the claim-

ant having died as the result of his injury on March 30th, 1948 and the claimant herein, Lois G. M. Ross, having filed a claim for death benefit as the Widow of Kenneth R. Ross and a hearing having been held on such claim and the case submitted for decision, the Deputy Commissioner makes the following:

FINDINGS OF FACT.

"* * * that Lois G. M. Ross, born May 21, 1921 is the widow of the deceased herein by virtue of a common-law marriage contracted in the State of Colorado and is entitled to death benefit of $13.13 a week beginning with March 30, 1948; that John Gary Ross, born September 2, 1947, is the minor son of Kenneth Ross and Lois G. M. Ross and is entitled to a benefit of $3.75 a week beginning with March 30, 1948 payable to Lois G. M. Ross as his natural guardian".

The employer and carrier thereupon instituted a proceeding for judicial review of the compensation order pursuant to the provisions of section 21 (b) of the Longshoremen's Act, 33 U.S.C.A. sec. 921 (b), alleging that said compensation order was not in accordance with law for the following reasons: (1) Because the evidence does not support the finding of the deputy commissioner that Lois G. M. Ross was the common-law widow of the deceased employee; (2) even if such status was shown it did not exist at the time of the injury; (3) that the child, John Gary Ross, was not born at the time of the injury and, hence, is not entitled to compensation; (4) that neither the widow nor the child was dependent upon the deceased employee at the time of the injury and,

hence, are not entitled to compensation as the *dependent* wife and child, respectively.

The Court below by order entered on December 28, 1949 sustained the award and it is from said order that this appeal is taken.

ARGUMENT.

I.

THE FINDING OF THE DEPUTY COMMISSIONER THAT LOIS G. M. ROSS IS THE WIDOW OF THE DECEASED IS SUPPORTED BY EVIDENCE.

Before referring to the evidence which, in our opinion, supports the finding complained of it may not be inappropriate to invite attention to the following well established principles of the compensation law.

The Longshoremen's Act should be liberally construed in favor of the injured employee or his dependent family: *Baltimore & Philadelphia Steamboat Co. v. Norton, deputy commissioner,* 284 U.S. 408 (1932); *Fidelity & Casualty Co. of New York v. Burris,* 61 App. D.C. 228, 59 F. (2d) 1042 (1932); *Associated General Contractors of America, Inc., et al. v. Cardillo, deputy commissioner,* 70 App. D.C. 303, 106 F. (2d) 327 (1939); *DeWald v. Baltimore & O. R. Co.,* 71 F. (2d) 810 (C.C.A. 4, 1934), cert. den. October 8, 1934, 293 U.S. 581.

In the absence of substantial evidence to the contrary the presumption is "That the claim comes within the provisions of this Act"; section 20 (a) of the Longshoremen's Act.

The burden is on the plaintiff to show that there was no evidence before the deputy commissioner to support the compensation order complained of in the bill: *Grant v. Marshall, deputy commissioner,* 56 F. (2d) 654 (Wash. 1931); *United Employees Casualty Co. v. Summerous,* 151 S.W. (2d) 247 (Tex. 1941); *Nelson v. Marshall, deputy commissioner,* 56 F. (2d) 654 (Wash. 1931); *Gulf Oil Corporation v. McManigal, deputy commissioner,* 49 S. Supp. 75 (W. Va. 1943).

Logical deductions and inferences which may be and are drawn by the deputy commissioner from the evidence should be taken as established facts and are not judicially reviewable: *Parker, deputy commissioner v. Motor Boat Sales, Inc.,* 314 U.S. 244 (1941); *Liberty Mutual Ins. Co. v. Gray, deputy commissioner,* 137 F. (2d) 926 (C.C.A. 9, 1943); *Michigan Transit Corporation v. Brown, deputy commissioner,* 56 F. (2d) 200 (Mich. 1929); *Del Vecchio v. Bowers,* 296 U.S. 280 (1935); *Eastern Steamship Lines, Inc. v. Monahan, deputy commissioner, et al.,* 21 F. Supp. 535 (Me. 1937); *Grain Handling Co., Inc. v. McManigal, deputy commissioner,* 23 F. Supp. 748 (N.Y. 1938); *Simmons v. Marshall, deputy commissioner,* 94 F. (2d) 850 (C.C.A. 9, 1938); *Lowe, deputy commissioner v. Central R. Co. of New Jersey,* 113 F. (2d) 413 (C.C.A. 3, 1940); *Contractors, PNAB v. Pillsbury, deputy commissioner,* 150 F. (2d) 310 (C.C.A. 9, 1945).

The findings of fact of the deputy commissioner are presumed to be correct: *Anderson v. Hoage, dep-*

uty commissioner, 63 App. D.C. 169, 70 F. (2d) 773 (1934); *Luckenbach Steamship Co., Inc. v. Norton, deputy commissioner,* 96 F. (2d) 764 (C.C.A. 3, 1938); *Burley Welding Works, Inc. v. Lawson, deputy commissioner,* 141 F. (2d) 964 (C.C.A. 5, 1944).

It is solely within the province of the deputy commissioner or compensation administrator to determine the credibility of witnesses, and such official may believe all or any part of the testimony according to his own sound judgment of its truthfulness and reliability: *Wilson & Co., Inc. v. Locke, deputy commissioner,* 50 F. (2d) 81 (C.C.A. 2, 1931); *Naida v. Russell Mining Co.,* 159 Pa. Super. 155, 48 A. (2d) 16 (1946); *Griffin's Case,* 315 Mass. 71, 51 N.E. (2d) 768 (1944); *Pittsburgh Plate Glass Co. v. Morgeson,* 177 P. (2d) 115 (Okla. 1947); *Lockheed Aircraft v. Industrial Accident Commission,* 28 Cal. (2d) 756, 172 P. (2d) 1 (1946); *Square D. Co. v. O'Neal,* 66 N.E. (2d) 898 (Ind. App. 1946).

The rights, remedies and procedure under the Longshoremen's Act are governed exclusively by the statute, and the powers properly to be exercised by the Court are those only which are expressly conferred by the said Act: *Associated Indemnity Corp. v. Marshall, deputy commissioner,* 71 F. (2d) 235 (C.C.A. 9, 1934); *Shugard v. Hoage, deputy commissioner,* 67 App. D.C. 52, 89 F. (2d) 796 (1937); *Joseph W. Greathouse Co. v. Yenowine,* 193 S.W. (2d) 758 (Ky. 1946); *Luyk v. Hertel,* 242 Mich. 445, 219 N.W. 721 (1928); *Texas Indemnity Ins. Co. v. Pemberton,* 9 S.W. (2d) 65 (Tex. 1928); *Nierman v.*

Industrial Comm., 329 Ill. 623, 161 N.E. 115 (1928); *Town of Albion v. Industrial Commission,* 202 Wis. 15, 231 N.W. 249 (1930). Compare also: *Bassett, deputy commissioner, v. Massman Construction Company,* 120 F. (2d) 230 (C.C.A. 8, 1941) cert. den. 62 S. Ct. 92.

In considering the evidence the deputy commissioner may give weight to "the common-sense of the situation": *Avignone Freres, Inc., et al. v. Cardillo, deputy commissioner, et al.,* 73 App. D.C. 149, 117 F. (2d) 385 (1940).

Even if the evidence permits conflicting inferences, the inference drawn by the deputy commissioner is not subject to review and will not be reweighed: *C. F. Lytle Co. v. Whipple, deputy commissioner,* 156 F. (2d) 155 (C.C.A. 9, 1946); *Contractors, PNAB v. Pillsbury, deputy commissioner,* 150 F. (2d) 310 (C.C.A. 9, 1945); *South Chicago Coal & Dock Co., et al. v. Bassett, deputy commissioner,* 309 U.S. 251 (1940); *Parker, deputy commissioner v. Motor Boat Sales, Inc.,* 314 U.S. 244 (1941); *Liberty Mutual Insurance Co. v. Gray, deputy commissioner,* 137 F. (2d) 926 (C.C.A. 9, 1943); *Lowe, deputy commissioner, et al. v. Central R. Co. of New Jersey,* 113 F. (2d) 413 (C.C.A. 3, 1940); *Henderson, deputy commissioner v. Pate Stevedoring Co., Inc.,* 134 F. (2d) 440 (C.C.A. 5, 1943); *Del Vecchio v. Bowers,* 296 U.S. 280 (1935).

With these principles in mind the record will be referred to show that there was evidence to support

the finding of the deputy commissioner that Lois G. M. Ross was the widow of the deceased employee.

Lois G. M. Ross testified at the hearing before the deputy commissioner on June 15, 1948, as follows: That she is the wife of Kenneth Robert Ross (T. 31); that she and Mr. Ross came to Denver, Colorado, in June, 1947 and lived at 1933 Downing Street; that during their stay in Colorado she and Kenneth *considered themselves man and wife and that there was such an agreement;* that their landlady, Mrs. Alice Reid, and several other friends knew of their relationship as man and wife, one of whom was Jesse Craft of 950 Acoma Street (T 32); that she and her husband were the parents of the child who was given the name of John Gary Ross, and was born in St. Lukes Hospital, Denver, Colorado, on September 2, 1947; that when the child was born she, the witness, was admitted to the hospital as Mrs. Ross (T. 33); (there was then received in evidence exhibit "A" (T. 34), which was a certificate from the hospital to the effect that Mrs. Lois Ross was admitted to the hospital as a maternity patient on September 2, 1947, and a baby boy was born to her on September 2, 1947, and that *their records show that Mr. Kenneth Ross was the husband of the patient and the legitimate father of the baby*); that she paid for the burial vault for Mr. Ross and the burial was through the Veterans Administration (T. 37); that at all times during her stay in Denver (and elsewhere) in Colorado while Mr. Ross was living and after his death she held herself out as being married to Kenneth Ross and that she has many letters showing that she was (T. 38).

There was then received in evidence exhibit "C" (T. 39), from the Department of the Army, Fitzsimons General Hospital, Denver, Colorado, dated April 1, 1948, addressed to Mrs. Lois Ross, expressing regret to her in the loss of *her "husband, the late Kenneth R. Ross"*. Exhibit "D" which was next received in evidence (T. 41), was the death certificate of Kenneth R. Ross and showed that he was married and that his *wife's name was Lois Ross.* The detailed information on the certificate apparently taken, as indicated by the answer to question 16, from the "hospital record", relating to the deceased's birthplace, his father's name and birthplace, his mother's maiden name and birthplace, etc. indicate that the *source of the information must have been the deceased himself,* showing that he considered himself *married to Lois Ross.* Exhibit "E" (T. 42), is the birth certificate of the child, John Gary Ross, and shows that he was born at St. Lukes Hospital in Denver, Colorado, on September 2, 1947, that his mother's usual residence was 1933 Downing Street, Denver, Colorado, that his father was Kenneth Robert Ross whose residence was 1933 Downing Street, and whose birthplace was La Junta, Colorado, that the mother's name was Lois Gwendolin Ross whose residence was 1933 Downing Street.

Mrs. Ross further testified that the information on the certificate from the hospital (exhibit "A", T. 34) to the effect that Kenneth R. Ross was the husband of Lois G. M. Ross, was given to the hospital by her husband (T. 43); that there was never any marriage ceremony; that the circumstances under which they

started to live together as husband and wife were that he was sick (tuberculosis) and did not have any one to look after him and so she started to do so in October, 1946 (T. 44); that she first met Mr. Ross in Canada when he was in a hospital there "with us" at Fort Sand, Saskatchewan (T. 45); apparently she was a nurse at the hospital as the records show that she is a registered nurse by profession; that she came to see him in California in 1946 and that they started to live together about that time and continued to do so until his death; that there is one child, a son nine and one-half months old (T. 45); that she was never married before nor was her husband; that they came to Colorado to live in June, 1947 and that she stayed in Colorado with him until his death in March, 1948; that he was admitted to Fitzsimons Hospital on March 4, 1948, and that he was in a sanitarium for a month in Colorado Springs where she was with him (T. 46).

Mrs. Alice Reid testified in part as follows: That her address is 1933 Downing Street, Denver, Colorado; that she operates an apartment house at that address and did so between June, 1947 and March, 1948; that during said period she became acquainted with Mrs. Ross in May (the witness stated it was in the year 1946 but apparently she meant 1947 as other parts of the record show clearly that they lived there from May or June, 1947 until his death in March, 1948); that the husband arrived a few days later; that during all the time that they lived there she understood them to be married to each other; that when the husband arrived the wife was on duty at the hospital and he introduced himself as her husband (T.

47, 48); that they were known in the neighborhood as husband and wife; that when Mrs. Ross applied for an apartment she introduced herself as Mrs. Ross (T. 49).

Jesse Craft testified in part as follows: That his address is 930 Acoma, Denver, Colorado, that he is acquainted with Mrs. Ross; that he operates a service station and Mr. Ross traded with him; that he knew both Mr. and Mrs. Ross who frequently appeared at the service station together; that he was introduced to Mrs. Ross by Mr. Ross as his wife (T. 50, 51).

Mrs. Ross testified that she and Mr. Ross discussed going through a marriage ceremony and Mr. Ross said they would go to Mexico; that he was too sick to go; that even though they anticipated entering into a ceremonial marriage she and Mr. Ross considered themselves married (T. 52).

Exhibit "F" was received in evidence (T. 54) and consisted of seven envelopes addressed to Mr. and Mrs. Kenneth Ross.

It would appear from the foregoing that the deputy commissioner's finding that Lois G. M. Ross is the widow of the deceased was supported by evidence and thus supported should under the authorities be considered as final and conclusive. *Cardillo, deputy commissioner v. Liberty Mutual Ins. Co.,* 330 U.S. 469 (1947); *South Chicago Coal & Dock Co., et al. v. Bassett, deputy commissioner,* 309 U.S. 251 (1940); *Del Vecchio v. Bowers,* 296 U.S. 280 (1935); *Voehl v. Indemnity Insurance Co. of North America,* 288 U.S. 162 (1933); *Crowell, deputy commissioner v. Ben-*

son, 285 U.S. 22 (1932); *Jules C. L'Hote, et al. v. Crowell, deputy commissioner,* 286 U.S. 528 (1932); 71 C.J. 1297, sec. 1268; *Parker, deputy commissioner v. Motor Boat Sales, Inc.,* 314 U.S. 244 (1941); *Marshall, deputy commissioner v. Pletz,* 317 U.S. 383 (1943).

Common Law Marriage.

There are three elements necessary to constitute a valid marriage: (1) Intention of the parties, (2) legal capacity of the parties, (3) compliance with the laws of the state regarding solemnization of the marriage.

(1) *Intention:* Marriage is an agreement between a man and woman to become husband and wife. Like any other agreement there must be an intention, a meeting of the minds to enter into the contract. The intention can be determined from the acts and statements of parties. In the ordinary ceremonial marriage there is a public declaration by the parties that they there and then take each other as husband and wife. In non-ceremonial marriage the intention may be established by the declaration of the parties to friends and neighbors and in general by their actions in holding themselves out to the public as husband and wife. *United States v. Michaelson,* 58 F. Supp. 796 (Minn. 1945); *Klipfel's Estate v. Klipfel,* 92 P. 26, 41 Colo. 40. In the *Klipfel* case just cited the Court said:

> "Under the laws of Colorado marriage is a civil contract, and while the statutes provide for licenses, certificates, record and authority to per-

> form the marriage ceremony, a marriage is not void because it is not contracted in accordance with these provisions or was contracted in violation of them.
>
> "A marriage contract between parties capable of contracting, possessing clearly, *the one essential prerequisite of mutual consent,* followed by cohabitation as husband and wife, and such other attendant circumstances as are necessary to constitute the common-law marriage may be valid and binding although no solemnization has been attempted". (Emphasis supplied.)

There was nothing inconsistent in fixing the status of marriage *per verba de praesentia* and agreeing that the relationship then constituted shall be publicly solemnized at a future date. *Moffat Coal Co. v. Industrial Commission,* 118 P. (2d) 796, 108 Colo. 388.

(Appellants intimate (P. 13) that the present requirement in the Colorado law relating to a premarital physical examination should make a change in the decisions relating to the validity of common-law marriages in Colorado. It is well recognized that in the absence of any express declaration, the law presumes that an act relating to marriage did not intend to make any change in the common-law. *Buradus v. General Cement Products Co.,* 52 A. (2d) 205 and authorities there cited. *Bishop* on *Marriage, Divorce* and *Separation,* sec. 424, is authority for the statement that a common-law marriage is valid notwithstanding a statute unless the statute contains express words of nullity, 39 A.L.R. 538.)

In the instant case the parties indicated their intention to be husband and wife, to their neighbors and friends, to the hospital where their son was born, to the hospital where the deceased died, and to the people with whom they did business. Their entire course of conduct from June, 1947 to the day of the husband's death was such as to spell out an intention to be husband and wife. As the Court stated in a recent case of *Dondero v. Queensboro News Agency,* 60 N.Y.S. (2d) 140 (1946):

> "A non-ceremonial marriage is not required to be proven in any particular manner; like any other fact it may be shown by direct or circumstantial evidence * * *.
>
> "Hearsay and traditional evidence, as well as an admission of a party, is competent to prove a marriage when such evidence is the best the nature of the case will afford * * *".

It was for the deputy commissioner as the trier of the fact to determine whether the parties intended to enter into a marital relationship; if there is evidence to support his finding as to said marital relationship said finding is conclusive. *Green v. Crowell, deputy commissioner,* 69 F. (2d) 762 (C.A. 5, 1934) cert. den. 293 U.S. 554.

(2) There is no evidence in the record that there was any impediment which would have prevented the parties from being husband and wife.

(3) *Compliance with the laws of the State regarding solemnization of the marriage:* It is a well established rule of conflict of laws and it was pointed out

as a definitely established doctrine in *Keyway Stevedoring Co. v. Clark,* 43 F. (2d) 983 (Md. 1930) which was a proceeding brought under the Longshoremen's and Harbor Workers' Compensation Act that the validity of a marriage is determined by the law of the place where the marriage was contracted. Inasmuch as the parties were unquestionably domiciled in Colorado at the time of Mr. Ross' death, it is proper to consider the evidence as to the marriage in accordance with the laws of Colorado. *Travers v. Reinhardt,* 205 U.S. 423, 440. In the *Travers* case just cited the parties entered into a relationship in Virginia which, however, did not constitute a valid marriage because the laws of Virginia prevented it; they then moved to Maryland which likewise did not recognize non-ceremonial marriages, and from there they moved to New Jersey where they lived until the husband's death. In these circumstances, the Supreme Court said:

> "This brings us to consider what were the relations of these parties after selling the Maryland farm and after taking up their residence in New Jersey in 1883. That their cohabitation, as husband and wife, after 1865 and while they lived in Maryland, continued without change *after they became domiciled* in New Jersey and up to the death of James Travers; and that they held themselves out in New Jersey as lawfully husband and wife, and recognized themselves and were recognized in the community as sustaining that relation, is manifest from all the evidence and circumstances. It is impossible to explain their conduct towards each other while living in New Jersey upon any other theory than that they re-

garded each other as legally holding the matrimonial relation of husband and wife. It is true that no witness proves express words signifying an actual agreement or contract between the parties to live together as husband and wife. No witness heard them say, in words, in the presence of each other, 'We have agreed to take each other as husband and wife, and live together as such'. But their conduct towards each other, from the time they left Alexandria in 1865 up to the death of James Travers in 1883, admits of no other interpretation than that they had agreed, from the outset, to be husband and wife. And that agreement, so far as this record shows, was faithfully kept up to the death of James Travers * * *.

"Did the law of New Jersey recognize them as husband and wife *after they took up their residence* in that State and lived together, in good faith, as husband and wife and were there recognized as such? Upon the authorities cited this question must be answered in the affirmative.

"We are of the opinion that even if the alleged marriage would have been regarded as invalid in Virginia for want of license, had the parties remained there, and invalid in Maryland for want of a religious ceremony, had they remained in that State, it was to be deemed a valid marriage in New Jersey after James Travers and the woman Sophia, as husband and wife, took up *their permanent residence* there and lived together in that relation, continuously, in good faith, and openly, up to the death of Travers—being regarded by themselves and in the community as husband and wife. Their conduct towards each other in the eye of the public, while in New Jersey, taken in connection with their

previous association, was equivalent, in law, to a declaration by each that they did and during their joint lives were to occupy the relation of husband and wife. Such a declaration was as effective to establish the status of marriage in New Jersey as if it had been made in words of the present tense after they became domiciled in that State".

Marital Status of Claimant.

Some portion of appellants' brief has been devoted to an effort to show that a common-law marriage could not arise because the parties knew that in California a common-law marriage could not take place (and apparently that the relationship could not ripen into a valid marriage in Colorado where they later repaired). This presumably was an effort to distinguish the instant case from the celebrated case of *Travers v. Reinhardt,* 205 U.S. 423. Whatever present effectiveness there may be to the rule that a "meretricious" relationship can not ripen into a marriage, it is respectfully submitted that the relationship between claimant and the deceased was not meretricious in Colorado (if indeed it may be so considered in California). The evidence shows that from the beginning of the relationship in Colorado it was intended to be a marriage relationship. Moreover, even if the relationship were meretricious in the beginning it became a valid marriage upon removal of the impediment (if the laws of California can be considered an impediment in the sense in which it is used in the rule that upon removal of an impediment an otherwise illegal relationship ripens into a valid marrige) when the parties removed to Colorado. That was exactly

the situation in *Travers v. Reinhardt,* supra, and the fact that in that case one of the parties was not aware that the relationship in Virginia and in Maryland, respectively, did not constitute a marital relationship would not distinguish that case from the instant case. The import of the *Travers* case is that a marriage which is valid where it takes place is valid everywhere, and that when the parties came to New Jersey to live in a matrimonial relationship which was recognized under the laws of New Jersey, it was immaterial that prior thereto they had lived together in Maryland and Virginia, in neither of which jurisdictions was the relationship recognized as a marriage.

Moreover, the rule that upon removal of an impediment a common-law marriage may arise has sometimes been applied "though one or both parties know of the impediment". *Thomas v. Murphy,* 107 F. (2d) 268 (App. D.C. 1939); *Cartwright v. McGown,* 121 Ill. 388, 12 N.E. 737; *Lanham v. Lanham,* 136 Wis. 360, 117 N.W. 787.

Appellants also urge in substance that common-law marriages should not be encouraged. That may be so, but as stated in *Hoage, deputy commissioner v. Murch Bros. Construction Co.,* 50 F. (2d) 983, 986 (App. D.C. 1931) "if the doctrine of common-law marriage is contrary to public policy and public morals, it is for Congress (in the District of Columbia and correspondingly for the legislatures in the various states) and not the Courts to do what is needful by appropriate legislation to declare such unions null and void". This was a compensation case under the same Act.

II.

PLAINTIFFS' OTHER OBJECTIONS TO THE COMPENSATION ORDER ARE NOT WELL FOUNDED.

Plaintiffs' other objections to the compensation order were: (a) that even if Mrs. Ross established the status of widow she was not the wife of the deceased at the time of injury (b) likewise that John Gary Ross was not a child of the deceased at the time of injury, and (c) in any event that the widow and child were not "dependent" upon the deceased at the time of injury and, hence, are not entitled to compensation.

Section 2 (16) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. sec. 902 (16), defines the term "widow" as:

> "The term 'widow' includes only the decedent's wife living with or dependent for support upon him *at the time of his death;* or living apart for justifiable cause or by reason of his desertion *at such time".*

The Act has never been construed as to bar a surviving wife from benefits because she married the employee after the injury; a similar provision in the New York Workmen's Compensation Law *from which the Longshoremen's was taken almost verbatim* was given a similar construction prior to the enactment of the Longshoremen's Act. *Crockett v. International Railway Co.,* 162 N.Y.S. 357, 176 App. Div. 45 (1916) cited with approval in *Mutimer v. General Electric Company,* 201 N.Y.S. 588, 207 App. Div. 1 (1923), which held in addition that a provision in the New York Law similar to Section 9 (f) of the Longshore-

men's Act was not applicable in the case of a widow since she is not required to prove dependency where she was living with her husband. Accord: *Van Wyk v. Realty Traders,* 213 N.Y.S. 28, 215 App. Div. 254 (1926). The Court in that case stated that compensation death benefits were intended as a substitute for the right to sue which the survivors might have for the death of the husband and father, and that in such action the surviving wife would have been entitled to recover regardless of the fact that she married the deceased after the injury. The Court further stated that it should not be assumed that it was intended to restrict or narrow the widow's rights or to place her in a less advantageous position than she would have occupied before. Under familiar rules of construction the adoption of a statute carries with it the construction placed upon the adopted statute in the jurisdiction of its origin. *Capitol Traction Co. v. Hof,* 174 U.S. 1; *Metropolitan Railroad Co. v. Moore,* 121 U.S. 558; *Bethlehem Shipbuilding Corp., v. Monahan, deputy commissioner,* 54 F. (2d) 349 (C.A. 1, 1931), cf. *Case v. Pillsbury, deputy commissioner,* 148 F. (2d) 392 (C.A. 9, 1945). We have cited three decisions under the New York Law prior to the enactment of the Longshoremen's Act, all of which clearly support the position that a surviving wife who marries an employee after an injury is his widow within the meaning of the compensation law and that actual dependency of the widow is irrelevant in the consideration of her entitlement to compensation benefits.

Appellants assert however that the *Crockett* case, supra, the New York case which was decided prior

to the enactment of the Longshoremen's Act, should not be followed because it is not a decision of the highest Court of that state. Whether the decision of an intermediate Court of the State of New York construing a similar section of the New York Workmen's Compensation Law from which the Longshoremen's Act was adopted is merely persuasive or should be followed by a Federal Court in the absence of more evident indication of the meaning of a state law, we are not prepared to say. There is, however, authority for the latter view, *Six Companies v. Joint Highway District No. 13,* 311 U.S. 180, 132 A.L.R. 967; *Fidelity Union Trust Co. v. Field,* 311 U.S. 169; *Kane v. Sesac,* 54 F. Supp. 853.

The following cases also hold that a widow who married the employee after the injury is entitled to compensation: *Reagh v. Texas Indemnity Insurance Co.,* 67 S.W. (2d) 233, 123 Tex. 57 (1934); *McKay v. Dept. of Labor,* 39 P. (2d) 997, 180 Wash. 191, 98 A.L.R. 990 (1935); *State Compensation Insurance Fund v. Hartman,* 64 P. (2d) 122, 99 Colo. 324 (1937); *Rosell v. State Industrial Accident Commission,* 95 P. (2d) 726, 164 Or. 173 (1939).

The construction which we here advocate is consistent with the use of the words "dependent husband" in Section 9 of the Act, relating to the receipt of compensation whereas in the same section the "surviving wife" is directed to be paid. The section directs payment to the "surviving wife or dependent husband". Likewise in Section 2 (17) of the Act, 33 U.S.C. Sec. 902 (17) a widower is defined as the decedent's husband who at the time of her death lived

with her *"and was dependent for support upon her"*. There is no such requirement in the case of a wife (see Sec. 2 (16)) except where not living with the husband.

The same reasoning with respect to the wife who married the deceased after the injury would apply to a child of a deceased born after the injury. As the Court stated in *Crockett v. International Railway Co.*, supra,

> "* * * but suppose a man married before an injury, lives a year or longer, after such injury, and then dies in consequence thereof, and in the meantime a child or children is born to him before his death, such child or children would have to be excluded from the benefits of this statute, if the widow in this case is to be excluded therefrom. It is unthinkable that the legislature intended such a result".

There is nothing in the definition of "child" in the Act, Sec. 2 (14), 33 U.S.C.A. Sec. 902 (14) which would limit the benefits payable to a "surviving child or children of the deceased", Sec. 9 (b), 33 U.S.C.A. Sec. 909 (b), to children who were born prior to the injury. Appellants urge that the definition of "widow" and "child" should be qualified by the provision in Sec. 9 (f), 33 U.S.C.A. Sec. 909 (f), to the effect that "all questions of dependency shall be determined as of the time of injury". It may be stated that death benefits to the wife and children do not rest upon dependency. *Maryland Dry Dock Co. v. Parker, deputy commissioner,* 37 F. Supp. 717 (Md. 1941); *Crockett v. International Railway Co.,* 162 N.Y.S. 357, 176 App. Div. 45 (1916). They are en-

titled to compensation whether or not they are dependent, hence said provision does not relate to them. It is not the "dependent wife" but the "surviving wife" and it is not the "dependent child" but the "surviving child" who is entitled to the award under Section 9 (b), 33 U.S.C.A. sec. 909 (b). If, therefore, the phraseology be given its ordinary and natural meaning a "surviving wife" or a "surviving child" means a wife or child respectively who survives the husband and father, irrespective of the time the wife married him or of whether the child was born after the injury. That the widow and children may be considered as included in the generic term "dependents" elsewhere in the Act in the sense that all persons who receive compensation death benefits are referred to as "dependents" does not mean that they must establish dependency. The same term in the same Act may have varying meanings depending upon the context. *Lawson, deputy commissioner v. Suwanee Fruit & S.S. Co.,* 336 U.S. 198 (1949). In section 5 of the Longshoremen's Act for example the surviving wife is enumerated separately from "dependents".

If the surviving wife must also be *a dependent wife* to be entitled to compensation then the provision in the second category of the definition of widow in Section 2 (16) of the Act, 33 U.S.C.A. Sec. 902 (16), is superfluous; in substance it requires a wife who is *not living with the husband at the time of his death* to show that she was "dependent for support upon him at the time of his death". As stated, if dependency is always an element of proof in the case of a surviving wife, the quoted provision was unnecessary.

It is to be noted also that in all the categories in said Section 2 (16), 33 U.S.C.A. Sec. 902 (16) relating to the definition of widow, it is emphasized therein that the qualifying conditions refer to the *time of death* of the deceased employee, not to the time of injury.

Moreover, assuming *arguendo* that the provision in Section 9 (f) to the effect that all questions of dependency shall be determined as of the time of injury limits the right to compensation to those in existence and having the proper status at the time of the injury, the word "injury" is defined in subdivision 2 of Section 2 of the Longshoremen's Act (33 U.S.C.A. Sec. 902 (2)) also to mean "death"; therefore where death results from accidental injury and it is necessary to determine whether dependency existed, such dependency is to be determined as of the time of death. This is consistent with the rule of statutory construction that all provisions of a statute should be construed together. It has been stated particularly that Section 9 of the Longshoremen's Act should be construed with Section 2 (16) in the determination of a widow's right to compensation. *Williams v. Lawson, deputy commissioner,* 35 F. (2d) 346; *Moore Dry Dock Company v. Pillsbury, deputy commissioner,* 169 F. (2d) 988 (C.A. 9, 1948). Therefore in determining whether the widow is entitled to compensation under the provisions of Section 9, consideration should be given to Section 2 (16), which defines the term "widow" and emphasizes that the determination should be made as of the date of death.

CONCLUSION.

In view of the above it may be stated that the determination of the deputy commissioner to the effect that Lois Ross and John G. Ross are the widow and child respectively of the deceased "has substantial roots in the evidence", the award "is not forbidden by the law" and is therefore conclusive. (Quotation is from *Cardillo, deputy commissioner v. Liberty Mutual Insurance Co.*, 330 U.S. 469, 478 (1947)).

It is respectfully submitted that the compensation order complained of was in accordance with law and that the order of the Court below sustaining it, was proper and should be affirmed.

Dated, San Francisco, California,
June 6, 1950.

Respectfully submitted,

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